

ACT Human Rights Commission

National Mental Health Facilities Guidelines
Workshop

University House Common Room ANU, Canberra

ACT Human Rights and Discrimination
Commissioner: Dr Helen Watchirs

2 December 2008

Introduction

Human Rights Commission - independent agency established on 1 November 2006 under *Human Rights Commission Act 2005* to provide a fair & accessible process for dealing with complaints about (and service improvement role):

- health services and services for older people (200+)
- disability services (16 pa)
- services for children & young people (8pa)

Discrimination complaints (100+ discrimination pa) –
Discrimination Act 1991 & Human Rights Act 2004

Key features of ACT HR Act

- Implements ICCPR not yet ICESCR (health)
- Direct right of action against public authorities and remedy in Supreme Court from 1 January 2009 - s.40B it is unlawful for a public authority:
 - (a) to act in a way that is incompatible with a human right; or
 - (b) in making a decision, to fail to give proper consideration to a relevant human right.
- S.30 (1) ‘in working out the meaning of a Territory Law, an interpretation that is consistent with human right is **as far as possible to be preferred**’. Read down/in primary legislation consistently with right
- Supreme Court’s ‘**Declarations of Incompatibility**’ (nil so far - UK 3+ Mental health DOI led to law reform: fitness for discharge involuntary patients; removal of forensic prisoner to hospital detention after serving non-parole period; appoint ‘nearest relative’ - accord patient’s wishes)
- S.37 all govt Bills A-G’s Compatibility Statement (Greens -new practice Private Members Bills too). Cabinet Submissions & Scrutiny Committee.
- S.28 restrictions on HR legislative criteria proportionate - involuntary detention & exceptional use of restraints/seclusion

Overview

- Australasian Health Facility Guidelines (HFG) reflect advances in best practice. Standards must comply with international human rights treaties and local legislation, some jurisdictions not just ‘aspirational’ - positive obligation on public authorities to act in accordance with HR
- Amenity - evolving standards anyway, eg ethics, therapeutic jurisprudence label. HR not new
- Already special needs in design, eg accessibility issues for consumers with mobility issues;
- Comparative design approaches in HR jurisdictions, eg UK 1998 HR ACT & NZ 1990.
- Key HR issues that should inform design include:
 - Humane treatment in detention
 - Least restrictive environment
 - Equivalence of health care
 - Non-discrimination

Practical design & human rights synergy

- Reception welcoming – not empty (button/phone on wall)
- good space flow can make monitoring of consumers easier for staff prevent incidents escalating, but workstation placement not make ‘goldfish bowl’ or isolated
- facility design significantly impacts on decisions and actions taken by staff, eg if a facility is poorly designed with lots of ‘nooks and crannies’ - more difficult for staff to monitor consumers and be aware of their needs. Good design incorporates issues such as ‘line of sight’
- Signage in accessible information eg level readily understandable by target audience/clients – NESB, young people;
- UN standards for detention - pleasant and therapeutic design helps staff and clients eg. access to air, light (but photosensitivity some medication), appropriate space

HR obligations on ‘public authorities’

- Well designed facilities are necessary in fulfilling obligations on ‘public authorities’ – includes outsourcing.
- HR not Charity model of service provision – not Victorian era ‘deserving poor’ UK Audit Commission Report HR service delivery takes time to build culture
- NB mental illness self-stigma – eg ‘do you think we have the right to housing/health or do you think we have done enough wrong to be homeless/ill’
- facility focused on consumers’ therapeutic needs eg. pleasant, clean surroundings, ample access to fresh air and sunlight etc - easier for staff to ensure the standard of ‘humane’ treatment is met.
- Decisions of international courts eg ECHR - a number of aspects of consumers’ surroundings might not of itself amount to inhumane treatment, but when combined, may have the potential to be non-compliant

Humane Treatment

- Section 10(1) of HRA provides '*no-one may be tortured, or treated or punished in a cruel, inhuman or degrading way*'. This provision is intended to protect an individual's dignity – there are no circumstances where such treatment can be rendered lawful. Lack of staff resources not an excuse for non-compliance with fundamental minimum)
- s.19 provides (relevantly) '*Anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person*'. (lesser standard) Covers civil and criminal involuntary detention - emphasises that notwithstanding patients are often admitted to mental health facilities on an involuntary basis, their human rights must be promoted and protected.

Least restrictive environment

- Important human rights principle underpinning the provision of mental health services and facilities is the need to treat patients in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others, eg Principle 9.1 *UN Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care*,.
- Continue connection with community – will return and assistance with admission/discharge. Step up/down.

Equivalence of health care

- An important underlying principle for provision of health care to those in detention is the principle of equivalence.
- *UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care: 1* ‘All persons have the right to the best available mental health care, which shall be part of the health and social care system.’
- Principle 20 - Principles apply to mentally ill persons ‘serving sentences of imprisonment for criminal offences, or who are otherwise detained in the course of criminal proceedings or investigations ‘to the fullest extent possible, with only such limited modifications and exceptions as are necessary in the circumstances.’
- Forensics - Principle 9 of the *UN Basic Principles for Treatment of Prisoners* - ‘[p]risoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.’
- Damning indictment - Burdekin Report 1994. 1996 Rights Analysis Instrument based on UN Principles – applied 2001

Non-discrimination & special measures

- *UN Principle 1: Fundamental freedoms and basic rights* – ‘There shall be no discrimination on the grounds of mental illness’.
- People with a mental illness have the same fundamental rights as every other person, whether they are being treated in a mental health facility or if they are in the community
- Special measures OK
- Remote ATSI clients – ground floor (never used lift before). Also better for suicide prevention, but not escape.
- Disability access eg wheelchair: new UN Convention & Treaty body
- Not separate mother and infant? (case by case basis)
- Freedom of religion – spiritual place in prisons (mental health detention shorter periods)

Children and Young People

- Underpin design – explicit ‘best interests’ and rights of children and young people to participate in decisions affecting them (Article 12 Convention on the Rights of the Child).
- Need more recreation space and educational facilities than adults
- positive obligation on state parties to ensure that no child is deprived of access to health care services. Children deprived of liberty as last resort - necessary to treat the child in a manner that takes into account of his or her age.
- Article 37(c) CRC children should be separated from adults in detention unless it is considered in the child’s best interests not to do so. [Australia’s formal reservation to this aspect of the CRC on the basis of the impact of Australia’s geography and demography and the need to maintain a child’s contact with their families – n/a ACT HR Act higher standard].
- If the mental health facility is not one specifically dedicated to C&YP, still need special measures eg. one on one ‘specialling’

HR Controversies

- Smoking – only outdoor areas?
- Right to self-expression – include graffiti?
- Hard cases – dual diagnosis and drug use
- security (avoid deaths/harm in custody) in the least restrictive environment (same content just different emphasis)
- Searches for contraband – pat only (not strip)
- Forensic patients
- Fixed or heavy furniture (plastic: cigarette burns)?

Rights-based approach

- HR expression, reflect & influence on built environment
- Domestic rather than institutional design – cf imposing eg Kenmore Goulburn, Bedlam
- Normalised – campus design, eg Village Green communal areas & cottages (transitional)
- Sexual safety ensured – women vulnerable
- Duty of care – foreseeable harm, eg self-harm or others.
- Flexibility – care with mixing, not male & female bedrooms; children/adults
- No overcrowding
- Privacy – quiet space, but monitor, eg soft light & CCTV for high dependence
- opportunity to interact, eg visitors – protect family unit
- Acoustics important – disruption not agitate other clients
- Incorporate room for Tribunal hearings – roundtable rather than formal
- Not spray paint bed numbers on wall – dignity and respect?
- Objective – recovery/rehabilitation
- Access to outside – supervised internet/email, newspapers/TV/radio
- Structured day

Human Rights Commissioner role

- assist individuals/organisations inquiries (not complaints)
- review and report to Attorney-General: table LA – audit conditions of detention 2005 Quamby, adult Corrections 2007. Service review by Health Complaints - PSU.
- power to seek leave to intervene in court/tribunal
- power to inspect facilities (*Corrections Management Act 2007*)
- community education: primary school Art Awards, train trainer, newsletter, media profile, interns (ANU & UC & overseas);
- advise Attorney-General (5) - comment on cabinet submissions
 1. Emergency ECT treatment
 2. *Children & Young Persons Act 2007*
 3. Anti-terrorism laws
 4. Indigenous Intervention

The Future?

- 5 year HR Act review
- ARC ANU/DJACS Linkage project – current ICCPR, ESCR next
- Victorian *Charter of Rights and Responsibilities Act 2006*. Tasmania & WA.
- National Bill of Rights – announce consultation 10 December, International Human Rights Day
- AHRC & Ombudsman monitor immigration detention – lack recognition of mental illness, eg Cornelia Rau, Vivian Alvarez Solon
- 10 December 2008 Community Forum - 60th Anniversary of UN Declaration of Human Rights